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No. 90-1131

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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On February 14, 1991, respondents served their brief in opposition to the petition which rail labor had filed with this Court seeking a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision of that court in *Railway Labor Executives' Ass'n v. Chesapeake Western Ry.*, 915 F.2d 116 (4th Cir. 1990). That responsive brief raised several arguments to which petitioners submit a reply should be made; this reply brief is respectfully submitted pursuant to Rule 15.6 of the Rules of This Court.

RESPONDENTS' ARGUMENTS AS TO WHY THIS COURT SHOULD NOT GRANT THE WRIT SERVE TO DEMONSTRATE THE URGENT NEED FOR THAT WRIT TO BE GRANTED

Petitioners argued in their petition that this case presents an important question of federal law, which should be reviewed by this Court, in part because the circuits are hopelessly confused over the impact which a carrier's claim of a contractual right to alter the status quo during bargaining over proposed changes to existing agreements—*i.e.*, during a "major dispute"—has on the enforceability of the Railway Labor Act's status quo obligation.[1] Respondents have answered that argument by asserting that the circuits are not confused over the *results* to be reached in such cases and that the result reached by the appellate court in this case—*i.e.*, that a dispute over what working conditions must be maintained as part of the status quo during a major dispute is itself a "minor dispute" over which the federal courts have no jurisdiction—is compelled by this Court's recent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* [hereinafter, "*Conrail*"], 491 U.S. —— (1989). Petitioners submit that respondents' view of this Court's decision in *Conrail* is erroneous, but more importantly, petitioners submit, respondents' arguments demonstrate the urgent need for this Court to grant the writ in this case.

1. Respondents' argument that there is no conflict among the circuits, because the circuits have all *rejected* rail labor's challenges to railroad line sales (Resp. Br. at 18), is wrong factually,[2] but nevertheless serves to

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[1] The Railway Labor Act's status quo obligation is set forth in Sections 5 First, 6 and 10, 45 U.S.C. §§ 155 First, 156 and 160. *See, Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969).

[2] Respondents' arguments are wrong factually, for the Eighth Circuit in *Railway Labor Executives' Ass'n v. Chicago & North*

emphasize the need for this Court to clarify the relationship between the Act's status quo obligation and a contract interpretation dispute. First, as petitioners pointed out in their petition (Pet. at 23), and as respondents' implicitly acknowledge (Resp. Br. at 17), the Eighth Circuit disagreed with the other circuits on the issue presented by this petition, for that court concluded on the same record as presented to the Seventh Circuit [3] that the dispute over what actions a carrier could take during the bargaining process did not present a minor dispute. *Railway Labor Executives' Ass'n v. Chicago & North Western Transportation Co., supra,* note 2. And second, even though the Second, [4] Third [5] and Seventh [6] Circuits agreed that this same controversy raised a minor dispute, the reasoning which those courts used to reach that *result* is not similar; indeed, the reasoning differs on one crucial aspect—the significance of an obligation to bargain. In the Second and Third Circuits, contrary to the

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Western Transportation Co., 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990), enforced the Act's bargaining command, even though it failed to make that ruling effective by enforcing the status quo obligation, as well.

[3] *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, Sup. Ct. No. 90-991 (February 25, 1991). A comparison of the record in the Seventh Circuit case with that in the Eighth Circuit, involving the same railroad, the same agreements and the same past practice, shows that they are essentially identical.

[4] *CSX Transportation, Inc. v. UTU*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990).

[5] *General Committee of Adjustment v. CSX R.R.*, 893 F.2d 584 (3rd Cir. 1990).

[6] *See*, note 3, *supra*. The Seventh Circuit's 1990 decision modifies its earlier decision in that case, 855 F.2d 1277 (7th Cir.), *cert. denied*, 488 U.S. 966 (1988), which applied the same reasoning as used in the Second and Third Circuit cases—*i.e.*, a dispute was either major or minor, and if minor there was no bargaining obligation. *See*, 855 F.2d at 1285 n.2.

result reached by the Fourth and Eighth Circuits, the unions' Section 6 notices did not trigger the railroads' obligation to bargain, because, according to the Second and Third Circuits, the same overall dispute could not be both major and minor. The Eighth Circuit also agrees that the same dispute cannot be both major and minor, but the Fourth and Seventh Circuits hold that the two can exist simultaneously, yet again with different results insofar as the ultimate right to exercise self-help over the bargaining demand is concerned. *Compare*, Pet. App. at 9a, *with*, 908 F.2d at 157.

Petitioners agree that where the lower courts consistently reach the same result when applying the *same law* to comparable facts, review by this Court usually is not warranted. However, where similar results are reached by applying different and contradictory principles of law to similar facts, review by this Court is warranted, especially when, as here, the principles of law applied by the lower courts are contrary to decisions of this Court and the governing statute.

2. Respondents assert that the Fourth Circuit's decision need not be reviewed by this Court because that decision, they claim, is consistent with and, they add, compelled by this Court's decision in *Conrail*. Even if that were so, which it is not, that assertion does not resolve the conflict of reasoning which currently exists among the circuits to reach the conflicting results on the *bargaining obligation—i.e.*, the obligation that triggers the status quo obligation. Indeed, as petitioners explained in their petition (Pet. at 20-23), the circuits are hopelessly at odds on the crucial issues raised by this petition, and only review by this Court of those issues can resolve this conflict.

More important, though, is the fact that, contrary to respondents' argument, the reasoning employed by the

Fourth Circuit, especially as explained by respondents, is in conflict with this Court's decision in *Conrail*. According to respondents, this Court concluded in *Conrail* that if a railroad shows that it is at least arguable that its actions are justified by its express or implied agreements, then federal courts lack jurisdiction over a union's claim that those same actions violate the Railway Labor Act's status quo obligation. Resp. Br. at 13.[7] This simplistic interpretation of the relationship between major and minor disputes (an analysis which does not go far enough), can be viewed as forming the underlying premise for the decisions by all of the circuits in these line sale cases, but this is also where the similarity ends, and where its consistency with *Conrail* ends.

Where respondents' and the Fourth Circuit's reliance on *Conrail* falters, and where the reasoning of the Second and Third Circuits departs from that of the Fourth Circuit in this case, is that this Court observed in *Conrail* that "district courts have subject matter jurisdiction to enjoin a violation of the status quo pending completion of the required [Railway Labor Act bargaining] procedures . . . ." *Conrail*, slip op. at 4. Moreover, as this Court held in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 152-53 (1969), and observed in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. —— (1989), slip op. at 13 n.15, the Act's status quo obligation extends past contractual obligations and looks, instead, to the "actual, objective working conditions and practices, broadly conceived . . . ." 396 U.S. at 153. Consequently, the crucial inquiry which must be

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[7] Respondents concede in their brief that they "do not bargain with their unions, under the RLA, with respect to any of their decisions to enter into sales, leases, and other railroad transactions" (Resp. Br. at 7, footnote omitted), but yet they claim that their actions in response to such line transfers are covered by their *agreements*.

made in this case, as well as in any case in which a party seeks to enforce the Act's status quo obligation, is whether the Act's status quo obligation *has been triggered*. That inquiry, *Conrail* teaches, is made by determining whether the Act's bargaining obligation has been triggered, for the status quo obligation flows from the bargaining obligation. *Detroit & Toledo Shore Line*, 396 U.S. at 156-58. Thus, if a bargaining obligation is present, the dispute is a major one and the Act's status quo obligation is both present and enforceable by the courts.

Contrary to respondents simplistic approach to this issue, *Conrail* does not provide the answer to the inquiry of whether the bargaining obligation has been invoked in this case, for in each of the line sale cases, unlike the facts presented in *Conrail*, the unions had served a notice under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to bargain for changes to the existing agreements. In the Second and Third Circuit cases, the courts concluded that the service of those notices did not "transform" the minor dispute into a major one, and, thus, did not invoke the Act's bargaining and status quo obligations. *E.g.*, 879 F.2d at 1000. But, here, the Fourth Circuit held that the unions' Section 6 notices, "to be sure," did raise a major dispute and thus, did invoke the Act's bargaining and, we submit, correlative status quo obligations. Whether or not the Fourth Circuit and respondents are correct in asserting that *Conrail* justifies the classification of this status quo dispute as being a "minor dispute" over which the federal courts have no jurisdiction, raises an issue which is in dispute among the circuits (*e.g.*, *Air Cargo Inc. v. Teamsters Local 851*, 733 F.2d 241, 246-47 (2d Cir. 1984)) and, as petitioners argued in their petition, should be addressed by this Court. It is simply too important an issue to be left so clouded.

CONCLUSION

For the reasons set forth in their petition, petitioners submit that the petition should be granted.

Respectfully submitted,

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